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Supreme Court, U.S.
FILED
JAN 10 1992
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CASE NO.91-963

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1991 TERM

STATE OF COLORADO, Petitioner

v.

**PETE GARCIA**, Respondent

**MOTION TO PROCEED IN FORMA PAUPERIS**

ON BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

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ATTORNEYS FOR MR. PETE GARCIA

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Pete Garcia moves pursuant to Rule 39 of the United States Supreme Court Rules for leave to proceed *in forma pauperis* and without payment of fees or costs in this matter, for the following reasons:

1. Mr. Garcia is today filing a Brief in Opposition to the Petition for Writ of Certiorari filed by the state in this court.

2. Mr. Garcia has been represented by court-appointed counsel, the Colorado State Public Defender, throughout his appeal. He has been declared indigent by the courts of the State of Colorado and has proceeded *in forma pauperis* since 1988.

3. Mr. Garcia is without funds with which to pay the costs of this proceeding.

4. Mr. Garcia should not be deprived if his opportunity to respond to the State's petition for writ of certiorari solely due to his indigency. He therefor requests leave to proceed in forma pauperis

DAVID F. VELA
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**AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS**

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ATTORNEYS FOR PETE GARCIA

**AFFIDAVIT OF PETE GARCIA IN SUPPORT OF**

**MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS**

I, Pete Garcia, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on the Brief in Opposition to the Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending against Petition for Writ of Certiorari and related proceedings are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   January 1987

   $1,000/mo.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Food stamps.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

$110.00/mo.

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and other clothing)? Yes

a. If the answer is yes, describe the property and state its approximate value.

1965 Corvair -- $50; 1952 International Van -- $100

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Pete Garcia

Subscribed and sworn to before me this 9th day of January, 1992.

Susan K. Rubin

My commission expires on 2-10-93.

**ORDER**

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

DATED: _____, 1992.

_____

JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

CASE NO.91-963

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

**STATE OF COLORADO**, Petitioner

v.

**PETE GARCIA**, Respondent

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

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CASE NO.91-963

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

**STATE OF COLORADO**, Petitioner

v.

**PETE GARCIA**, Respondent

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

**On Petition For Writ Of Certiorari To The Colorado Supreme Court**

## INTRODUCTION

Mr. Pete Garcia was the accused citizen below and will be referred to by name or as the accused. The State of Colorado was the prosecution below and will be referred to as the petitioner, the state or the prosecution. References to volume and page numbers in the following form (v1, p1), refer to the volume and page numbers of the record on appeal in the Colorado Supreme Court.

## STATEMENT OF THE CASE

On March 27, 1987, the Jefferson County sheriff's department executed a search warrant on the residence of Alger Garcia based on information from a confidential informant for illegal drug transactions involving Alger. Pete Garcia was asleep in the home. The officers first set off a flashbang and then shot the three dogs who were chained on the property. Pete Garcia ran from the home. Alger Garcia opened fire wounding two deputy sheriffs. (v1, p114-116) Pete Garcia was charged, apparently on a complicity theory, of two

counts of attempted first degree murder, two counts of first degree assault and two counts of crime of violence.[1] (v1, p13-15) Bond was set in the amount of $1,000,000. It was later reduced to $500,000. Mr. Garcia remained in custody until he entered a plea pursuant to plea negotiations. (v2, p3-4)

The district attorney offered to allow Mr. Garcia to plead guilty to one count of accessory to commit first degree assault.[2] (v1, p64) However, Mr. Garcia was concerned about the effect a guilty plea would have on his right to pursue a civil action against the sheriff's department. On at least two known occasions, he questioned his attorney on that effect and, on both occasions, his attorney advised him that a plea of guilty would not bar a civil action.[3] (v2, p7-9) Mr. Garcia accepted the offer and entered a plea of guilty to accessory to first degree assault on December 21, 1987.[4] (v2, p4-5)

After discovering that several of his civil claims had to be dismissed because they were barred due to his plea of guilty, Mr. Garcia filed a motion to withdraw his plea alleging ineffective assistance of counsel in that he would not have pleaded guilty had he been correctly advised concerning his civil suit. (v1, p72-79) At the hearing on this motion, Mr. Garcia's original trial counsel testified that Mr. Garcia was "continually concerned" about his civil remedies and that he advised Mr. Garcia that his civil remedies would not be barred. (v2, p7-8)

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1. If convicted, Mr. Garcia faced a mandatory minimum sentence of eighty years in the Colorado Department of Corrections up to one hundred and sixty years.

2. Accessory to commit first degree assault carries a potential sentence of from one to four years.

3. Throughout the Petition for Writ of Certiorari, the state uses the word "prevail." Mr. Garcia has never claimed that his attorney advised him that the effect of his guilty plea would not effect his ability to prevail in a civil action.

4. Mr. Garcia testified that his attorney explained to him that his plea of guilty was pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), which he understood to mean that he would plead guilty to something which was not true in order to get out of jail. (v2, p6)

The trial court denied Mr. Garcia's motion finding that Mr. Garcia was not prejudiced because he admitted the truth of the charges in his plea of guilty and it was this truth which barred the civil action. (v1, p83) The trial court did not address the professional competency component of an ineffective assistance of counsel claim.

The Colorado Court of Appeals reversed the trial court's finding that defense counsel's advice that Mr. Garcia's plea would not bar his desired civil claims was contrary to Colorado law and was not based on adequate research. The Colorado Court of Appeals further found that the "trial court incorrectly focused on whether [Mr. Garcia's] civil claims were dismissed because of 'truths' he admitted by virtue of his guilty plea" instead of applying the appropriate test for prejudice as set out in *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court of Appeals refused to conclude, as a matter of law, that defense counsel's conduct fell below acceptable standards. Instead, the case was remanded for factual determinations on prejudice based on the correct standard and whether defense counsel's incorrect advice fell below the range of reasonable competence demanded of attorneys in criminal cases.

On certiorari, the Colorado Supreme Court affirmed the Court of Appeals' finding that the proper standard for resolving the issue of prejudice was the determination of whether there was a reasonable probability that, but for counsel's errors, Mr. Garcia would not have pleaded guilty and would have instead insisted on going to trial. The Court held that, "[t]he trial court should have focused on that standard in determining whether, if defense counsel had properly advised Garcia about the effect of a guilty plea on his contemplated civil action against the law enforcement officers, Garcia would have rejected the plea bargain and would have risked a trial on the more serious charges in lieu of a guilty plea to the accessory charge." The Supreme Court then remanded the case to the trial court for determination of the professional competency component of the test for effective assistance of counsel.

Colorado did not decide in this case that a defendant could receive ineffective assistance if he were misadvised regarding a collateral consequence. It simply corrected the standard used in the trial court for determining prejudice on an ineffective assistance claim.

## REASONS WHY THE WRIT SHOULD BE DENIED

### SUMMARY OF THE ARGUMENT

This Court should not grant the state's request for a writ of certiorari because the question presented to this Court involves an issue which was not decided by the Colorado Supreme Court and is therefore not ripe. Any decision by this Court would be of an advisory nature only.

### THE QUESTION PRESENTED FOR REVIEW WAS NOT DECIDED BY THE COLORADO SUPREME COURT.

Petitioner states that the question presented for review is: **"Whether, as explicitly left undecided by this Court in *Hill v. Lockhart*, 474 U.S. 52 (1985), criminal defense attorneys are ineffective under the federal constitution for failing to advise correctly their clients about a collateral consequence of a guilty plea?"** The State contends that this Court should grant a writ because this case addresses an issue left open by *Hill v. Lockhart, supra*, and because this case conflicts with other decisions issued by United States courts of appeals.

Both in the question presented and in its first argument for reasons to grant the Writ, the Petitioner maintains that this Court declined to address this issue in *Hill v. Lockhart, supra*. That is incorrect. In *Hill*, this Court declined to address "whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel..." 474 U.S. at 211. (emphasis added). This case presented no issue relative to advice regarding parole eligibility.

Furthermore, the wording of this question makes it appear as if the the Colorado courts held in this case that an attorney must advise their clients of all collateral

consequences of a guilty plea to avoid a finding of ineffective assistance of counsel. Although Mr. Garcia was affirmatively misadvised of a collateral consequence, neither the Colorado Court of Appeals nor the Colorado Supreme Court decided the issue of constitutional ineffective assistance of counsel.

As this Court is aware, to prevail on an ineffective assistance claim a criminal defendant must establish that 1) defense counsel's performance was constitutionally deficient and 2) the deficient performance must have prejudiced the defense of the case. However, *Strickland v. Washington, 466 U.S. 668 (1984)*, does not always require a court to consider both aspects of an ineffective claim. If a criminal defendant has failed to meet his burden on either portion of the standard, the court need go no further. In this case, the trial court did not address both components because it found that Mr. Garcia had failed to prove the prejudice prong. Under *Strickland v. Washington, supra*, the trial court was not required to address the standard of practice component.

However, in making its ruling on the prejudice component, the trial court applied an erroneous standard. The Colorado Supreme Court affirmed the Colorado Court of Appeals and reversed the trial court in its determination of the prejudice part of the ineffective assistance test required by *Strickland v. Washington, supra*. The Colorado Supreme Court then remanded the case to the trial court to determine if defense counsel's erroneous advise fell below the range of competence demanded of attorneys in criminal cases pursuant to *Hill v. Lockhart, supra*.

Although this case does deal with ineffective assistance in relation to a guilty plea tendered in a situation where counsel misadvised his client on a collateral issue, neither that issue nor the question presented by Petitioner was decided by the Colorado Supreme Court in this case. As the Colorado Supreme Court stated in its opinion, "[w]hether or not defense counsel's advice was incorrect and, if so, whether it was so unreasonable as to amount to ineffective assistance raised a mixed question of fact and law, (cite omitted), which cannot be decided on the state of this record."

## CONCLUSION

Because the Colorado Supreme Court did not address the issue raised by the state's petition for a writ of certiorari, this Court should deny the state's request for a writ.

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Colorado State Public Defender

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SUPREME COURT, U.S.

## PROOF OF SERVICE

I, Robin Desmond, a member of the Bar of the Court, hereby certify that on the 10th day of January, 1992, one copy of the Motion to Proceed in Forma Pauperis, Affidavit in Support of the Motion to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were sent by mail, postage pre-paid:

Gail Norton
110 16th St.
10th Floor
Denver, Colorado 80202

I further certify that all parties required to be served have been served.

Robin Desmond
ROBIN DESMOND
Counsel for Respondent